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CURRENT TOPICS.

In *Ryder v. Wilson*, the Supreme Court of New Jersey recently passed upon the vexed question as to whether a right of action which has become barred under the statute of limitations, can be revived by the repeal of the statute. BEASLEY, C. J., said: "The proposition is, that if a statute of limitation be repealed, all rights of action which were destroyed by it are revived and can be enforced by a judicial proceeding. But I can find nothing in the nature of the transaction, nor in legal principles, that will lend the least support whatever to such a contention. The decisions of the courts, so far as my research has extended, are wholly in accord on this subject, and, with one voice, they declare that when a right of action has become barred under existing laws, the right to rely upon the statutory defense is a vested right that cannot be rescinded or disturbed by subsequent legislation." Cooley on Const. Lim., 369.

In the recent case of *Attorney General v. Mylchrest*, 40 L. T. N. S. 767, it was held by the English House of Lords that the word "minerals" in a grant did not include clay and sand. It was said that the word in its scientific and widest sense might include substances of this nature, and, when unexplained by the context or by the nature and circumstances of the transaction or by usage (where evidence of usage is admissible) would, in most cases, do so. But the word has also a more limited and popular meaning, which would not embrace such substances, and it may be shown by any of the above mentioned modes of explanation that, in the particular instrument to be construed, it was employed in this narrower sense. In the case of Earl of Rosse v. Wainman, 14 M. & W., 859, the Court of Exchequer held that in an Inclosure act containing a clause reserving to the lord of the manor all mines and minerals, the latter word was used in its full sense. The court said: "The word minerals, though more frequently applied to substances containing metal, in its proper sense includes all fossil bodies or matters dug out of mines;" and it decided that beds of stone found in the allotments which might be dug by quarrying, belonged to the lord. In coming to this decision the court looked at the whole act to ascertain its object and intention, and referred to other parts of it in support of its construction of the word. An elaborate inquiry into the various senses in which the word "mineral" might be used was made by Kindersley, V. C., in Darvill v. Roper, 3 Drew. 294. In certain deeds of partition there occurred an exception of "the mines of lead and coal and other mines of minerals." Scientific witnesses were examined, who, according to the report, agreed in defining minerals to be any crystalline or earthy substance, whether metalliferous or otherwise, existing in or forming part of the earth, and which might be worked by means of a mine or quarry. The vice chancellor refused to interpret the word in this sense, and construed it, according to what he considered to be the intention of the parties to be collected from the deeds, to mean such minerals only as are worked by means of mines. He consequently held that quarries of limestone were not within the exception. In this case the vice chancellor sought to discover from the general scope of the deeds, the sense in which the parties had used the word. Kindersley, V. C., gave the same construction to the word "minerals" when used in an exception in a modern conveyance of land, and held that freestone did not come within it. Bell v. Wilson, 12 L. T. N. S. 529. His opinion on this point was overruled by the lords justices, but they at the same time agreed with him in his construction of the power to work the minerals, holding that the grantee could only get the freestone by underground working. The exception in this case contained the word "metals" before minerals, indicating that the latter word was intended to embrace substances other than metals. The deed also contained nothing from which it could be inferred that the word "minerals" was not to have its full meaning. Turner, L. J., said: "Freestone is a mineral, and I can find nothing in the nature or context of this deed to

show that it was not intended to be included in the exception." Bell v. Wilson, L. R., 1 Ch. App. 303; 14 L. T., N. S. 115. The last decision to which reference need be made is Hext v. Gill, L. R. 7 Ch. App. 699; 26 L. T. N. S. 502. In that case the Duke of Cornwall, as lord of a manor, had granted the freehold of a tenement to the copy-holder, reserving "all mines and minerals within and under the premises," with power to work them. It was held that a bed of china clay was within the exception. An injunction was, however, at the same time granted to restrain the duke from getting the china clay in such a way as to destroy or seriously injure the surface, though, as the court observed, this was the only way in which it could be got. Mellish, L. J., stated the result of the authorities, in his view, to be, "that a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or nature of the transaction to induce the court to give it a more limited meaning."

ANTE-NUPTIAL CONTRACTS, WHICH BAR DOWER.

The origin of antenuptial contracts is not precisely known. That they grew out of the system of legal jointures, in vogue prior to the Statute of Uses is pretty clearly established. Cæsar and Tacitus are both authorities to show that provisions for the wife before marriage were made by the ancient Germans and Gauls. The latter says: "*Dotem non uxor marito sed uxori maritus offert intersunt parentes et propinqui et munera.*" De Mor. Germ. ch. 18; 1 Washb. Real Prop. 315. It was not until the passage of the Statute of Uses, 27 Henry VIII. ch. 10, however, that jointures were regarded as of any importance, and then only in connection with the mode of barring dower. As the effect of that statute was to unite the legal and equitable estates and let in dower, giving to those who had already been provided for by jointure, a double portion, it was enacted by subsequent provisions, that lands so given by way of jointure previous to marriage would bar dower, unless the donees were evicted therefrom. 27 Henry VIII., sec. 6-9. That the right to bar dower did not exist at common law and was the creature of statute, is shown from the fact, first, that no right could be barred until it had accrued; and, second, because no right to an estate of freehold could be barred by any col lateral satisfaction or recompense. Co. Litt. 36*b*; Vernon's Case 4 Co. 1. Legal jointures to bar dower called for six requisites. How far they are now regarded as conditions essential to accomplish the same purposes needs no explanation. Legal jointures are obsolete, but the statutes of the States have prescribed conditions, the provisions of which are based upon the old system of barring dower adopted three centuries ago.

Among the numerous English and American decisions which have resulted in establishing what is now known as equitable jointures, or antenuptial contracts, the following are given as the more important of the earlier ones governing this subject.

1. It should take effect immediately upon the death of the husband. In Garthshore v. Chalie 10 Ves. 1, the bar of dower was a covenant of the husband that his executors should, within six months after his death, convey to his wife, surviving, a portion of his real and personal estate. In Selleck v. Selleck, 8 Conn. 85*n*, the husband had entered into a writing that should his wife survive him, his executors should pay her, within four months after his decease, one hundred dollars in full of all claims.

2. It must be for her own life at least, and not *per autre vie*, or for any term of years, or any smaller estate. In Davila v. Davila, 2 Vern. 724, the wife was barred of dower by a covenant of the husband to pay her £1,500 out of his real or personal estate in consideration of the intended marriage, and £1,000. In Charles v. Andrews, 9 Mod. 151, the court say, that in equity a woman before marriage, being of age, and covenanting to accept a term of years or other chattel interest in bar of dower, would not be permitted to have both. In Tinney v. Tinney, 3 Atk. 8, the heir at law claimed that the widow was barred of dower by a bond of the husband agreeing to secure her £400 in case she survived him. He did not succeed; but this was on the ground that the bond did not express that the £400 was in lieu of dower, and the chancellor refused to

hear parol evidence to that effect, on account of the Statute of Frauds and Perjuries. In Andrews v. Andrews, 8 Conn. 80, there was no provision extending beyond the life of the husband; yet the widow was decreed to be barred. The court say in this case: "There is, perhaps, no principle better settled than that any provision which an adult before marriage agrees to accept in lieu of dower, will amount to a good equitable jointure." In Shaw v. Boyd, 5 Serg. & Rawle 310, and Jones v. Powell, 6 Johns. Ch. 194, we find a recognition of the doctrine, that acceptance of a term of years or a sum of money, or a trust estate, or any other kind of collateral satisfaction is a good bar in equity, and in Kennedy v. Mills, 13 Wend. 553, it was said that the wife may, by her assent, before marriage, be barred by a pecuniary provision. In McCartee v. Teller, 2 Paige, 518, the intended wife was an infant at the time the contract was made. The Chancellor said: "An adult female might in equity bind herself by an ante-nuptial agreement to receive a simple pecuniary provision, although uncertain as to the time of its commencement, or as to the extent of its duration. The text-books are full of allusions to the same effect. 4 Dane's Abr., c. 130. An adult woman is said to be barred: By her acceptance of any provision, however small and precarious. 1 Cruise Dig. 226: by her acceptance of any provision. Clancy on Husband and Wife; by her agreement to accept any provision, however inadequate or precarious. 1 Roper on Husband and Wife, 476; by any terms which she may think proper to accept. 1 Washb. Real Prop., 319. She may accept, if she pleases, a chance in satisfaction of dower, she agrees to. Williams Real Prop. 226.

3. It must be made to herself, and not to another in trust for her. In Vizard v. Longden, cited in Tinney v. Tinney, 3 Atk. 8, and Earl v. Drury, 2 Eden, 66, by Lord Hardwicke, who was counsel in the case, the bar of dower was a bond by the husband, previous to marriage, agreeing to settle on the wife £14 per annum for her livelihood and maintenance. In Jordan v. Savage, Bac. Abr. Jointure. B 5, 717, 2 Eq. Ca. Ab. 102, cited in 2 Edens Ch. 66, and 2 Paige, 557, the wife was held barred of her customary free bench by a covenant of the husband with trustees to settle his land to certain uses, provided that the lands so settled on the wife should be in lieu of her customary estate. In Williams v. Chilty, 3 Ves. 545, leasehold estates assigned in trust for the wife in lieu of dower were held to be a good equitable jointure. In Estcourt v. Estcourt, 1 Cox's Ch. 20, the wife was held barred of dower by a bond of the husband to the wife's mother, his intended wife being twenty-five years of age, conditioned to settle £500 per annum on the wife for life, to be in full satisfaction of her dower. In Tew v. Earl of Winterton, 3 Bro. C. C. 493, it appears that the court considered the wife barred of her dower by a bond entered into by the husband before marriage, to convey sufficient estates, in trust, to pay her in case she survived him, an annuity of £600 in lieu of dower. In Corbet v. Corbet, 1 Sim. & Stu. 612, the widow was held barred by an indenture of the husband, before marriage, granting to trustees a yearly rent charge of £100 in bar of dower. See also Hervey v. Hervey, 1 Atk. 563. The dower is barred, whether the wife was, or was not, of age at the time of the settlement, provided it received the assent of the parent or guardian. Earl v. Drury, McCartee v. Teller, Corbet v. Corbet, *supra*.

4. It must be in satisfaction of her whole dower, and not of a part of it. Co. Litt. 36 b.; Vernon's Case, 4 Co. 1.

5. It must be so expressed or averred, or by necessary implication appear to be so made in satisfaction of dower. Co Litt. 36 b.; Vernon's Case, 4 Co. 1.

6. It must be made before marriage. 5 Johns. Ch. 482.

Of all the conditions which the original legal jointure prescribed, as requisites for barring dower, only the last three have been retained as necessary conditions in the execution of a valid ante-nuptial contract. The statutes of the various States may have made some modications in these provisions, but they have all substantially enacted similar clauses.

While it is seen that the courts have departed far from the requisites essential to constitute a good legal jointure in the construction of ante-nuptial contracts, and have given them a liberal interpretation—Dominick v. Michael, 4 Sandf. (N. Y. Sup. Ct.) 374; Gause v. Hale, 2 Ired. (N. C.) Eq. 241; Smith v. Maxwell, 1 Hill (S. C.) Ch. 101; Hutchins v. Dixon, 11 Md. 29—they have always looked upon them

with the same circumspection as upon agreements between persons standing in a fiduciary relation to each other. They have been none the less guarded than relations existing between parent and child, or guardian and ward, and circumstances attaching the least suspicion to those relations, will often render them void and of no effect.

Did the contract comply with the provisions of the statute? Was it reduced to writing, and properly signed? Was it in lieu of dower, and expressly stated in the deed? Was there any fraud or misrepresentation at the time, which induced the wife to assent to its conditions? These are questions which present themelvesto the consideration of the court, and demand its careful attention. As to the compliance of the contract with the statute of frauds, what will be considered a sufficient part performance, to constitute an exception to the rule and take it out of the operation of the statute, is often difficult to determine. In 4 Strobh. (S. C.) Eq. 179, it is stated that a parol agreement in consideration of marriage, if made and sufficiently proved, will be sustained as an ante-nuptial settlement; but where the only proof shows that the understanding was made after marriage, it will not be sustained. In 3 Call (Va.) 384, a parol marriage contract, entered into before Va. Stat. 1785, requiring marriage contracts to be recorded, was sustained against a subsequent voluntary conveyance. See, also, Houghton v. Houghton, 14 Ind. 505; Beard v. Griggs, 1 J. J. Marsh (Ky.) 22.

The case of Kline v. Kline, 57 Penn. St. 120, is interesting as furnishing an instance of what was regarded as a material concealment or fraud in the contract, setting it aside. The judge of the lower court, in giving judgment, said: "The woman was bound to exercise her own judgment, and take advantage of the opportunity that existed to obtain information; if she did not, it was her own fault. The parties were dealing at arms-length He was not bound to disclose to her the amount or value of his property." Judge Sharswood reversed the judgment, saying: "To say that she was bound, when the contract was proposed, to exercise her judgment—that she ought to have taken advantage of the opportunity that existed to obtain information, and that if she did not do so, it was her own fault, is to suggest what would be revolting to all the better feelings of woman's nature; to have instituted inquiries into the property and fortune of the betrothed would have indicated that she was actuated by interested motives. She shrunk from the thought of asking a single question. She executed the contract without hesitation and without inquiry. She believed that he would propose nothing but what was just, and she had a right to exercise that confidence. She lived with him seventeen years, and, no doubt, assisted largely in accumulating the fortune of fifteen thousand dollars, of which he died possessed." W. H. W.

FRANCHISE — MEANING OF TERM, MEMBERSHIP IN BOARD OF TRADE.

BOARD OF TRADE v. PEOPLE.

Supreme Court of Illinois.

[Filed at Ottawa, June 21, 1879.]

The right of membership, in the board of Trade, an organization for the transaction of commercial business, is not a "franchise" in the strict sense in which that term is used in the statute, and therefore an appeal does not lie from the circuit court directly to the supreme court, in a case where such a right is involved.

Appeal from Cook County.

SCOTT, J., delivered the opinion of the court:

The relator having been expelled from the Board of Trade of the city of Chicago, filed a petition in the circuit court of Cook county for a *mandamus*, to compel that body to restore him to membership. On the hearing, a peremptory writ of *mandamus* was awarded in accordance with the prayer of the petition, and respondent brings the case directly to this court on appeal, notwithstanding the law establishing appellate courts was in force when final judgment was pronounced in the cause. The relator moves to dismiss the appeal on the ground that this court has no jurisdiction to hear the errors assigned.

The decision of the motion made involves a construction of the statute under which the appeal was taken, that is supposed to confer the right and which provides as follows: "Appeals and writs of error shall lie from final orders, judgments or decrees of the circuit courts * * * directly to to the Supreme Court in all criminal cases and in cases involving a franchise or a freehold or the validity of a statute." The practice act upon the same subject provides that "in all criminal cases and in cases in which a franchise or a freehold or the validity of a statute is involved, appeals shall be taken directly to the Supreme Court, in case the party appealing shall so elect, excepting in

chancery cases." As this is not a chancery suit, it is maintained the appeal will lie, because it is claimed a "franchise" is involved.

The Board of Trade is a corporation organized under a special act of the General Assembly, and is a corporation organized solely for the purpose of transacting commercial business and for no other purpose whatever. The relator was a member of the Board and was entitled to all the benefits of membership. Whether relator was lawfully or illegally expelled is not a matter that need now be considered. The subject of the present litigation concerns his membership and his right to be restored to the enjoyment of its privileges. No question is made that in any degree concerns the validity of the corporation, nor has the litigation any relation to it. The inquiry, then, must be, does the membership of the relator come within the definition of a "franchise," as that term is used in the statute? Our conclusion is it does not. This court in Chicago, &c. R. Co. v. People, 37 Ill. 547, adopted the definition of a franchise as given by Blackstone, that "it is a royal privilege or branch of the King's prerogative subsisting in the hands of the subject, and being derived from the crown must arise from the King's grant," and added that "corporate franchises in the American States emanate from the government or sovereign power; owe their existence to a grant, or as at common law to prescription, which presupposes a grant, and are invested in individuals or a body politic." Precisely the same definition has been uniformly given of a franchise by text writers and courts of the highest authority. Angel & Ames on Corp., secs. 4, 737; Bank of Augusta v. Earle, 13 Pet. 519; Morgan v. Louisiana, 3 Otto, 217; City of Bridgeport v. New York, &c. R. Co., 36 Conn. 255; People v. Utica Ins. Co., 15 Johns. 358. In the Bank of Augusta v. Earle, it was said by the court: "It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State."

As was said in City of Bridgeport v. New York, &c. R. Co., "the term, franchise, has several significations, and there is some confusion in its use, but when it is used in a statute or elsewhere in the law, it is generally, if not always, understood as a special privilege conferred by grant from the State or sovereign power, as being something not belonging to the citizen of common right." In Morgan v. Louisiana, the court very justly remarked that "much confusion of thought had arisen from attaching a vague and indefinite meaning to the term, franchise."

It must have been in this restricted sense the term "franchise" was used by the General Assembly in the statute we are considering and not in that broad sense contended for. No doubt the word "franchise" is sometimes used as synonymous with privileges and immunities of a personal character, but in law, its appropriate meaning is understood to be something which the citizen can not enjoy without legislative grant. Many of our religious, benevolent, literary and scientific societies and associations are incorporated under general or special laws, but it was never understood that members of such societies or associations possessed or exercised any franchise. That they obtain what is most appropriately termed "membership," which means freedom of the privileges it confers, and nothing more. That is precisely the case at bar. Relator had membership in this corporation and the freedom of its privileges, whatever they were, but in no just sense did he exercise any franchise granted to him or the corporation by the General Assembly. It is lawful for any person or association of persons to transact commercial business without legislative grant for that purpose. A corporation for such purposes is a mere convenience and nothing more. A member of such a corporation exercises no other right in the buying or selling of commodities than what any citizen of common right may do; except as in the present instance, by virtue of his membership, he may transact such business in a room belonging to the corporation, which is a mere privilege and not a franchise in the sense that term is used in the statute. One test that might well be applied, is that in case of the non user or misuser by the party owning membership in such a corporation, an information would not lie against him at the suit of the people. It is not understood that the people are prosecuting this case further than to give the writ which any citizen may invoke as a statutory right. Further than that, the people lend no aid to this prosecution. So far as the General Assembly has granted a franchise to this corporation, it is a matter of no public concern who owns a membership in the corporation.

No franchise in the sense that term is used in the statute being involved in this litigation, the motion made must prevail, and the appeal will be dismissed.

SCHOLFIELD and DICKEY, J.J., dissenting:

We do not concur in the opinion. We think that the word "franchise" as used in the constitution and in the statute was not used in the strict technical sense, but in its broader and more popular sense.

BOND — STIPULATION FOR ATTORNEY'S FEES IN CASE OF ACTION UPON.

WILSON SEWING MACHINE CO. v. MORENO.

United States Circuit Court, District of Oregon, August, 1879.

A stipulation in a bond to pay a reasonable attorney's fee to the plaintiff, in case a promissory note is not paid, or other contract is not performed according to its terms, and the party entitled to demand such performance is compelled to enforce it by law, is just and valid.

DEADY, J.

On September 1, 1877, the defendant, Moreno, with four others as his sureties, executed and delivered a bond to the plaintiff in the penal sum of

$1,000, conditioned for the payment of all indebtedness on the part of Moreno to the plaintiff; and on November 23, 1877, said Moreno with two others as his sureties, executed and delivered another bond of like amount and condition to the plaintiff.

These actions are brought upon these two bonds to recover an amount alleged to be due from said Moreno for goods, wares and merchandise sold and delivered to him by the plaintiff, and it is agreed that the amount due the plaintiff on such account is on promissory notes, $741.74, and upon an open account, $629.70; in all, the sum of $1,371.44. Each bond contains a stipulation to the effect, that in case suit is brought upon the same, the obligors therein will pay, in addition to the penalty thereof, the sum of $100 "for attorney's fees." The plaintiff now moves for judgment upon the complaint for the amount admitted to be due and for an hundred dollars in each action as an attorney's fee therein.

This latter part of the motion the defendant resists upon the ground that the provision in the bond for the payment of such fee, in addition to the penalty thereof, is void.

It appears from the books that the question raised upon this motion is comparatively a new and vexed one. It has mostly arisen in actions upon promissory notes containing a stipulation for the payment of a fixed sum or percentage as an attorney's fee to the plaintiff, in case an action is brought to collect the same. And the objection to the stipulation usually is, that the amount which may be collected upon the note, being thereby rendered uncertain, it is unnegotiable and not valid as against an endorser, or that such stipulation makes it usurious, and therefore void in whole or part.

But in some few instances, the courts have gone farther and held that such a stipulation is absolutely void, as contrary to the policy of the law and tending to the oppression of the debtor.

In Bullock v. Taylor, 7 Cent. L. J. 247, decided by the Supreme Court of Michigan in 1878, a stipulation in a note for the payment of a certain sum as an attorney's fee over and above all taxable costs, in case the same was sued upon, was held void as opposed to the policy of the law upon the subject of attorney's fees, and susceptible of being made the instrument of oppression. In Woods v. North, 84 Pa. St. 409, it was held that a similar stipulation in a note rendered the instrument non-negotiable, and thereby relieved the indorser from liability thereon. In Witherspoon v. Musselman, 8 Cent. L. J. 75, decided by the Kentucky Court of Appeals in 1878, according to the brief abstract in the CENTRAL LAW JOURNAL, *supra*, it was held that such a stipulation in a note was void, because it tended to the oppression of the debtor and the encouragement of litigation.

On the contrary, in Smith v. Silvers, 32 Ind. 321, it was held that a stipulation "whereby the debtor agrees to be liable for *reasonable* attorneys' fees, in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand, is not only not usurious, but is so eminently just that there should be no hesitation in inforcing it." In Wyant v. Pottorff, 37 Ind. 512, a stipulation in a note for a reasonable attorney's fee was impliedly sustained, though it was held that there must be proof of what is a reasonable fee. In Nickerson v. Sheldon, 33 Ill. 372, it was held that a stipulation for an attorney's fee did not affect the negotiability of the note, but the fee was not claimed in the action. In Clawson v. Munson, 55 Ill. 394, a stipulation in a mortgage to secure a note for an attorney's fee to be paid as part of the costs of collection was held valid—the court citing Dunn v. Rogers, 43 Id. 260, in which a similar stipulation in a mortgage was enforced—and upon the question of hardship said that the defendants had expressly provided in the mortgage for the consequences in default of payment, which they might have avoided "by paying the notes at maturity." In Gaar v. Louisville Banking Co., 11 Bush 189, it was held that a stipulation in a note for an attorney's fee was not usurious, but an agreement to pay a penalty in default of prompt payment of the notes, and therefore valid.

In Howenstein v. Barnes, 9 Cent. L. J. 48, decided by the United States Circuit court for the District of Kansas, in 1879, it was held that a stipulation for an attorneys' fee is valid; that it did not affect the negotiability of the paper.

The ruling that such a stipulation makes the amount payable upon the note uncertain, and it is, therefore, non-negotiable, is extremely technical, and I think unsound. The principal and interest is the sum due upon the note at maturity, and by the payment thereof it will be fully satisfied. And it is only in case of default in such payment and after the note is overdue, and has therefore lost its character of negotiability, that the penalty or attorney's fee can be claimed or collected at all. In fact the stipulation, although contained in the note, is strictly and properly speaking no part of it, but a distinct contract, collateral thereto, as much as if it was written on a separate piece of paper.

The ruling that such a stipulation makes the note usurious is founded upon the unauthorized assumption of fact, that the sum agreed to be paid as an attorney's fee, in case the note is not paid at maturity, is not what it purports to be, but illegal interest in the disguise thereof. Of course, where it appears that such is the real nature of the transaction it should be treated accordingly. But the fact cannot be assumed any more than that a like sum of the alleged principal is illegal interest in disguise.

Accordingly, the tendency of the decisions hostile to this stipulation is to leave these untenable grounds and hold it void upon the ground that it is a convenient device for usury and tends to the oppression of the debtor. And it may be admitted that this suggestion is not without force, particularly in cases where the amount provided is largely in excess of what such collection could ordinarily be made for. But a court assumes to *make* the law rather than *declare* it when it pronounces such a contract void, not because it is prohibited or intrinsically wrong, but because it may be used as a cover for usury and a means of oppressing the debtor.

An agreement by the debtor to pay a reasonable

attorney's fee in case his creditor is compelled to incur the expense of an action to collect the debt, is only an agreement to so far reimburse the creditor the loss which he may sustain by reason of the debtor's failure to perform his contract to pay his debt. In justice and fairness it stands on as high ground as the right to recover damages for the non-performance of any contract—as to deliver grain or goods at a certain time and place.

If A loans B $1,000 for the period of one year for the sum of $100, and by reason of the failure of B to perform his contract, A is put to the expense of paying an attorney $50 to collect the same by action, no reason can be given why B should not make good this loss, and if so, why may he not agree to do so in advance? As it is, the law compels B to repay the fees which A is required to pay the officers of the court in the prosecution of his action, including a nominal attorney's fee of not more than $20. §§ 824, 983 of the R. S.

The provision in § 824, *supra*, allowing the prevailing party to tax an attorney's fee of from $5 to $20 is not, in my judgment, exclusive, but only applies in cases where the contract of the parties is silent on the subject. In such cases the law allows the fee prescribed and no more. But this does not prohibit the parties from contracting that a greater or less one shall be paid. A statute which simply provides that a plaintiff may recover interest on money over due, at a certain rate, does not preclude parties from agreeing that a different rate may be recovered under like circumstances. And if the borrower and lender, in the absence of any statute to the contrary, may agree upon any rate of interest for the use or detention of the loan, it is not apparent why they may not agree upon the payment of an attorney's fee in case the latter is required to collect the same by law.

But where the fee is so large as to suggest that it is a mere device to secure illegal interest or some unconscionable advantage, the court should be slow to enforce the payment of it and ought probably, upon slight additional evidence to that effect, to refuse to allow it, or reduce it to a reasonable sum. Borrowers and lenders seldom deal on equal terms, and the necessities of the former often constrain them to accede to terms and conditions which are oppressive, in the vain hope that they will be able to meet their engagements promptly, and thereby avoid the payment of the charges and penalties stipulated for in case of failure.

It would, then, be better if these stipulations were not made for a fixed sum or percentage, but rather for such sums as the court, under all the circumstances, might judge reasonable and right. In this way regard might be had to the nature and value of the services actually rendered by the attorney. Where the judgment is obtained without opposition on the part of the debtor, as is often the case, the fee should be less than where it is obtained against such opposition.

But after all, the right of the parties, in the absence of any statute to the contrary, to contract for the payment of a reasonable attorney's fee by the debtor, in case his creditor is put to the expense of collecting his debt by law, rests upon the same ground as the right to make any other contract not prohibited by law or *contra bonos mores*.

Assuming, then, what has not been questioned, and upon which I express no opinion, that $100 is no more than a reasonable fee in each of these cases, the stipulation is both just and valid, and therefore ought to be enforced. There must be judgment accordingly.

PROMISSORY NOTE — BONA FIDE PURCHASER—NOTICE—NATIONAL BANK.

ATLAS NATIONAL BANK v. SAVERY.

Supreme Judicial Court of Massachusetts March Term, 1879.

1. A, A MEMBER OF THE FIRMS of P & Co. and S & Co., made and signed in his own name three promissory notes, upon which he indorsed, out of the usual course of business of, and in fraud of the firm, and for his own benefit and accommodation, the firm name of S & Co. and also P & Co. These notes were obtained by the plaintiff in the market from a broker with no evidence that he was not a *bona fide* holder of said notes for value. *Held*, that there was no presumption that the broker was the agent of A, nor any presumption as to the ownership, other than that which the possession and power of disposition implies. *Held, further*, that the mere form of the notes themselves was not sufficient, as matter of law, to charge the plaintiff with notice of the fact that they were accommodation paper; but the jury are to say whether there was anything in the form of the notes, or in the way in which they were signed, which ought to excite the suspicion of a reasonably prudent man; and, if so, whether the plaintiff must have known that they were accommodation paper.

2. A NATIONAL BANK BOUGHT promissory notes in the market, and upon default of the maker brought suit thereon against the indorsers, who requested the court to rule that the plaintiff under its corporate powers had no right to purchase the notes, but the court declined so to rule, and instructed the jury that the bank had the right to purchase notes in the manner in which the notes in suit were purchased. *Held*, that assuming that a national bank can not purchase notes, the contract of purchase is entirely independent of the executory contract which the plaintiff is seeking to enforce; and whether the plaintiff is holding the notes for itself or for another, is wholly immaterial to the defendant, unless it shall appear that it is holding them for some one who could not enforce them against the defendant.

Action of contract on three promissory notes.

At the trial the following facts appeared in evidence: That the plaintiff bank purchased each of the three notes of a broker at its place of business, before maturity, at the then going rate of discount for first-class business paper; that the notes were signed by Alexander Law, who was a member of the firm of C. F. Parker & Co., and also of the firm of John Savery's Sons, and that the firm name of John Savery's Sons was indorsed upon said notes by said Law, out of the usual course of business of the said firm, in fraud of said firm and for his own

benefit and accommodation, but the officers of the bank testified that they had no notice or knowledge thereof, and the question as to whether the bank such notice or knowledge was submitted to the jury under instructions hereinafter stated; that the firm of C. F. Parker & Co. were dealers in boots and shoes in Boston, and the firm of John Savery's Sons were manufacturers and dealers in hollow iron ware in New York, and had never had any dealings with the firm of Parker & Co.; that the plaintiff had never before purchased any paper bearing the name of John Savery's Sons, and had never before seen the signature of that firm; that the firm of John Savery's Sons had not given or indorsed any notes for over twenty years, except notes received from their customers in the ordinary course of their business, and then only for collection; that the plaintiff purchased said notes on the strength of the indorsements thereon, and the same were duly protested when due; that the officers of the bank testified that they had no knowledge as to who constituted the firms of C. F. Parker & Co. or John Savery's Sons, or that Law was a member of either of said firms, or what was the business of either firm or their relations to each other, or that the firm of John Savery's Sons had not given or indorsed notes except for collection.

The defendant requested the court to rule that the plaintiff under its corporate powers had no right to purchase these notes, but the court declined so to rule, and instructed the jury that a national bank has the right, under the power given to it by the act of Congress, to purchase a note in the manner in which these notes were purchased, and thereto the defendant excepted.

The defendant also requested the court to rule that in determining whether or not the plaintiff is to be charged with notice of possible want of authority on the part of the person indorsing the firm name of John Savery's Sons, the jury are to consider that the notes are the individual notes of Law, but the court declined to rule in the form requested, but instructed the jury as follows:

In determining whether or not the plaintiff had notice of want of authority on the part of the person indorsing the firm name of John Savery's Sons, the jury are to consider that the notes are the individual notes of Law, in the way in which I have stated to you; *i. e.*, by the form of the notes the plaintiffs are charged with notice that the notes were the personal obligations of Law, upon which Parker & Co. and Savery's Sons were liable as indorsers.

The defendant also requested the following instructions:

That as the purchase of the notes by the plaintiff was the first dealing in paper on which the name of the defendant's firm appears, the plaintiffs are charged with notice that Law was a member of the firm of John Savery's Sons, and also of C. F. Parker & Co.

That the plaintiff is held to know the persons to whom it gave credit.

That the plaintiff can not maintain this action, if at the time the bank took the notes in suit from the broker and paid its money for them, it had notice or knowledge that they were contracted and issued for the private use of Law, or if the circumstances under which it took the notes and paid the money therefor were such as to authorize an inference of its knowledge or which ought to have put it on inquiry as to the real character of the transaction, unless the plaintiff satisfies the jury that the indorsement of John Savery's Sons was made with their knowledge and consent, or that the notes were indorsed by them in the ordinary course of the business of the firm; but the judge declined to rule in the form requested, but upon these points instructed the jury as follows:

It is said in the first place that upon the mere form of the notes themselves, the bank was charged with notice, and I have been asked to say to you, as a matter of law, that they were thereby charged with notice of the fact that this was accommodation paper, but I can not so rule to you as matter of law. If there is anything upon the face of the notes at all suspicious in its character, you may take that fact into consideration as bearing on the question whether, in point of fact, they did not have this notice or this knowledge, and the question for you is on this point: Is there anything in the form of the note or in the way in which it was signed which ought to excite the suspicion of a reasonably prudent man? If there is, that circumstance is one proper for you to consider in determining the real issue, which is, whether the bank had this knowledge or notice. The mere fact that there exist suspicious circumstances is not sufficient, in and of itself, to prevent the bank from recovering; but if there exist, as a matter of fact, suspicious circumstances, which you think ought to have put them, as reasonable and prudent men, on their guard and led them to make inquiry, these circumstances are proper for you to consider in determining the real issue, which is whether in point of fact the bank must have known that this was accommodation paper; and so as to the handwriting: if an ordinarily prudent man would have seen at once that the same person who signed the note had indorsed it, and if that would be a suspicious circumstance as tending to show it was accommodation paper, then that is a matter for your consideration. Then, if the bank knew that Alexander Law was a member of that firm, that is a circumstance and an important circumstance upon the question of notice; and upon the whole evidence you are to determine whether the bank did have this knowledge or notice.

The plaintiff can not recover if at the time the bank took the notes in suit from the broker and paid its money for them, it had notice or knowledge that the indorsement of the notes of John Savery's Sons was for the accommodation of Law; and if the jury find that the facts and circumstanstanees under which the plaintiff took the notes, including the form of the notes and what is indicated upon the face of them, were such as, in the opinion of the jury ought to have put the bank upon inquiry, then, though the court can not say as matter of law that they of themselves constituted

notice, or are conclusive evidence of notice, they are proper matters for the consideration of the jury upon the question whether the bank did or did not have such knowledge or notice. If they authorized, in the minds of the jury, a fair inference of such knowledge, the plaintiff can not recover; but if the jury find that the plaintiff did not in fact have knowledge and purchased the note in good faith, their verdict must be for the plaintiff. The true issue is whether they took the notes for value and in good faith without notice of fraud, and not whether there were suspicious circumstances. The suspicious circumstances, if any, are only to be considered by you as bearing on the issue thus presented. That is the instruction, I think, proper to give you in regard to this question of notice to the bank.

Bear in mind that the true issue is (I assume that these notes were fraudulent), whether the plaintiff had notice. All these other matters are matters of evidence for your consideration, as bearing on the question whether they had that notice or not. All the suspicious circumstances which have been alluded to; everything in the form of the note—all these matters are proper for your consideration, and you are to say whether or not, upon the whole evidence, you are satisfied that the bank must have had notice of the fact that this was accommodation paper, issued in fraud. The jury found for the plaintiff, and to the foregoing rulings and refusals to rule, and to the admissions of evidence, the defendant excepted.

Morse, Stone & Greenough, for plaintiff; *Edward Avery*, for defendant.

LORD, J., delivered the opinion of the court:

There was no error in the instruction of the court of which the defendant can complain. Some of the language of the presiding judge, when taken by itself, might well be a ground of complaint by the plaintiff; but we think that, taking the whole instruction together, the jury have passed upon the true issue, which is, whether there was fraud in the notes of which the plaintiff had knowledge, or as reasonable men should be presumed to have knowledge. The notes were obtained by the plaintiff in the market, with no evidence that the party from whom they were obtained was not a *bona fide* holder of the notes for value. The fact that the party from whom they obtained them was a broker, if from that fact it is to be inferred that he was not the owner, raises no presumption that he was an agent of Law for the negotiation of the notes. If any presumption could arise from that fact that he was the agent of any party to the notes, it would be that he was agent of the last indorser of the notes. But we think that the mere fact that he was a broker authorizes no presumption as to the ownership, other than that which the possession and power of disposition implies. The question as to the plaintiff's title to the notes is fully settled in the case of National Pemberton Bank v. Porter, 125 Mass. 333, and with that decision we are satisfied. If we assume that a national bank can not purchase a note, as claimed by the defendant, that contract of purchase is entirely independent of the executory contract which the plaintiff is seeking to enforce; and whether the plaintiff is holding the note for itself or for another, is wholly immaterial to the defendant, unless it shall appear that it is holding it for some one who could not enforce it against the defendant, of which there was no evidence nor presumption, nor was the question made at the trial. The argument of the defendant's council was based upon the fallacy that the broker of whom the notes were obtained was the mere representative of Law, of which, as we have said, there was no evidence, and the presumption, so far as there was any, was otherwise. Exceptions overruled.

PRINCIPAL AND AGENT — WARRANTY — MEASURE OF DAMAGES.

HERRING v. SKAGGS.

Supreme Court of Alabama, December Term, 1878.

1. PRINCIPAL AND AGENT — WARRANTY. — A general agent for the sale of safes has no authority, merely by virtue of his agency, to warrant them burglar proof.

2. RATIFICATION OF WARRANTY.—The receipt by the principal of the price of the safe which the agent sold and without authority warranted burglar-proof, will not amount to a ratification of the warranty, unless received or retained by the principal, with knowledge of the warranty.

3. WARRANTY OF SAFE "BURGLAR-PROOF" — MEASURE OF DAMAGES.—In the absence of fraud or bad faith, the proper measure of damages in a suit by the purchaser of a safe against the manufacturer, who warranted it "burglar-proof," is the difference between the value of the safe as it was, and what it would have been worth if it had been as represented; and not the damages sustained in the loss of valuables taken out of the safe by burglars, who effected an entrance into it.

4. TO CONSTITUTE THE FRAUD, IN SUCH A CASE, which will authorize recovery of the value of articles lost in the safe, there must be something more than the mere assertion that the safe was burglar-proof; there must have been an assertion as a fact, of that which the seller knew to be false; or a recklessly false affirmation that the safe was burglar-proof, when the seller did not know whether the assertion was true or false; or a knowledge on the part of the seller that the safe was not burglar-proof, and a failure to communicate that knowledge, when the seller knew that the purchaser was contracting for the safe as burglar-proof; and the purchaser trusting to these representations must have been misled by them.

Appeal from Talladega Circuit Court:

STONE, J., delivered the opinion of the court:

In Skinner v. Gunn, 9 Porter 305, speaking of the power of an agent to bind his principal, the court said: "The power in this case is to sell and convey the negro in the name of the plaintiff, and the agent must, as an incident of that power, and in the absence of any prohibition, have the right to warrant the soundness of the slave, as that is a usual and ordinary stipulation in such contracts, and must, therefore, be implied to effectuate the object of the power." The court, in the same case,

had said: "An authority to do an act, must include power to do everything necessary to its accomplishment."

This doctrine was re-affirmed in Gaines v. McKinley, 1 Ala. 446, and in Cocke v. Campbell, 13 Ala. 286. It will be observed that in those cases the court states, *as matter of law*, that "power given to sell a slave carries with it power to warrant his soundness," in the absence of prohibition. A similar principle is found in the books, in reference to the power of an agent to bind his principal by warranty of the soundness of a horse he is authorized to sell. It is a "usual and ordinary stipulation in such contracts," say the courts. Perhaps the custom of such warranties is so general, and has prevailed so long, that it has come to be treated as judicial knowledge. Certainly it was not intended to be affirmed that an agent, with general powers of sale, has unlimited power to bind his principal by any and every stipulation the various phases of traffic may be made to assume. If so, the words "in the absence of prohibition," found in the case of Skinner v. Gunn, *supra*, are meaningless and powerless. In the case of Fisher v. Campbell, 9 Porter 210, a question arose on the implied power of an agent to bind his principal. That was a case of a non-resident planter, whose overseer in charge made purchases of supplies for the plantation and hands. It was proved that the employer had given the overseer instructions to purchase pork for his slaves from a particular mercantile house at Montgomery, with whom he had made arrangements for that purpose, and had given him no directions to buy anywhere else, nor had he any authority to purchase from any other person. The plantation was in Lowndes county, and, the roads being bad, the overseer purchased pork in his own county, much nearer to him, and at Montgomery prices. Commenting on a charge requested by plaintiffs, and refused by the court below, this court said: "The last branch of the charge is stated as a corollary from the preceding proposition: That any special directions given to the overseer by the defendant, as to the place of purchasing, was wholly immaterial as to this purchase, unless from the evidence they were satisfied that plaintiffs were *informed* at the time of such sale, of such special directions; and that without this information the plaintiffs would be entitled to recover, if the proof was fully made out. We understand the law to be the exact converse of this proposition. When a person deals with one who professes to be the agent of another, the person contracting with him is bound to know the extent of his authority." See, also, McCreary v. Slaughter, at December term, 1877.

We are not prepared to assent to the doctrine in the unlimited sense that a general agent to sell has, by virtue thereof, the power to bind his principal by every species of warranty a purchaser may exact. In Benjamin on Sales, sec. 624, is the following language: "Warranties are sometimes given by agents, without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorized to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine, what is usual. If, in the sale of goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale." We fully approve and adopt this language of this very accurate writer. We do not intend, however, to overturn the doctrine declared in Skinner v. Gunn and Cocke v. Campbell, *supra*. As a rule, the agent has power to do whatever is usual—to enter into such express stipulations as are usual snd customary—in effecting such sales. What stipulations are usual and customary in effecting such sales, is not always matter of judicial knowledge. It is declared in the sales of slaves and horses to be within the knowledge of the court that it is usual to give warranties. It can not exist in the sale of all chattels. Generally—and we hold in a sale like the present—"it is a question for the jury to determine what is usual." This, in the absence of express authority in the agent to warrant; for if the agent had express authority, then his act is the act of his principal; and, in the absence of express authority, the question arises, and it is one for the jury, whether such warranty is customary in the sale of safes? If the jury, on the evidence, find there was such custom, then the principal is bound, "in the absence of prohibition" resting on the agent, and brought to the knowledge of the purchaser, to the same extent as if the principal himself had given the warranty. On the other hand, if there was no such authority given, and no such custom found to exist, then the principal would not be bound. True, if the principal ratified the act of such agent, although the act itself had been unauthorized, this would bind the principal. But the receipt of the purchase-money would have no such effect, unless received or retained with knowledge that the agent had given the warranty.

The sale in the present case was made by an agent. In the absence of proof of express authority to warrant, it was incumbent on the plaintiff to show a custom in the sale of safes to warrant them as burglar proof. Either the express authority or the authority implied from such proven custom, would constitute the act of the agent the act of the principal; but the law does not imply the authority, from the fact that Stewart, who conducted the sale, was a general agent. The third count of the complaint avers that the defendants "did employ an agent, and authorize him to sell such safes, and did hold him forth to the public residing in and about the town of Talladega, Alabama, and elsewhere, as their general agent for the sale of iron safes." This is the entire averment of authority, and we hold it insufficient. It should have been averred that the agent had authority to make the warranty. Being averred, proof of express authority, or custom to warrant, would have sustained the averment. The third count is insufficient, and the demurrer to it should have been sustained.

Under the principles above declared, it became a material inquiry whether Stewart had express authority to warrant the safe as burglar-proof. He

should have been permitted to prove that he had not such express authority. True, this would not necessarily exonerate the defendant. It would bear only on one phase of the inquiry; for if such warranties are usual and customary in the sale of iron safes, then even a prohibition of such authority to the agent would amount to nothing, unless knowledge of such prohibition was carried home to the purchaser before the sale was consummated. So, if the published descriptive pamphlet with which the agent was furnished tended to disclose what classes of safes were, and what were not represented as burglar-proof, and such pamphlet was exhibited to the purchaser pending negotiations, then that pamphlet should have been allowed to go to the jury, as shedding some light on the controverted question of warranty *vel non*.

The charge of the court, given in this case was in writing, covering all the points deemed material by the presiding judge. It is a continuous thing, and not divided into separate charges. Many of its utterances are free from error, because they assert plain and uncontroverted principles of law. This general charge covers six folio pages, and the only exception to it is in the following language: "To each of which the defendants excepted." This must be treated as a general exception to the whole charge, and under our rulings must be disregarded, unless the whole charge is erroneous. A portion of it, at least, being free from error, the appellant can take nothing by his assignment of errors: Jacobson v. State, 55 Ala. 151. So, the three charges given at the request of the plaintiff below are each free from error.

Against the objection and exception of defendants, the plaintiff was permitted to testify as follows: "If I had known the real thickness of the iron of the safe, I would not have risked my money in it as I did." This was simply proving a reason or motive, not communicated, for doing an act which resulted in the loss of the money. Plaintiff could have testified as a fact, that he had no personal knowledge of the thickness of the iron until after the safe was hewn open, and that he confided in the representations of Stewart as to its thickness and hardness. The jury then, if they believed this testimony, must have drawn their own inferences as to whether the plaintiff would or would not have risked his money in the safe, if he had known the true thickness and temper of the metal. This was eminently a function of the jury. But witnesses, particularly parties, should not, as a rule, be allowed to testify to secret, uncommunicated motives of their own conduct. Clement v. Cureton, 36 Ala. 120; Gibson v. Hatchett, 24 Ala. 201; Jones v. Hatchett, 14 Ala. 743; Goodman v. Walker, 30 Ala. 482; Whetstone v. Bank, 9 Ala. 875.

The demurrers also raise the question of the right to recover for the money and watch alleged to have been taken from the safe. The appellant contends that these damages are too remote. The doctrine of this court, affirmed in many cases is, that "the damages which are recoverable must be the natural and proximate consequences of the act complained of." 1 Brick. Dig. 522, §§ 8, 9, 10; Burton v. Holley, 29 Ala. 318; Ivey v. McQueen, 17 Ala. 408. It is said that the question of the extent of recovery on a breach of warranty has been much discussed of late, and the tendency of modern decisions is to extend the right of recovery to all the consequences of the breach, when there is fraud in the representation or stipulation; and in many cases it has been held when a manufactured article is sold for a known specific use, and it is not reasonably fit for the purpose, the right to damages goes beyond the bounds which limit the responsibility for an ordinary breach of warranty, and includes compensation for the mischief resulting from the failure of the article warranted, to answer the specific purpose to which it is applied. And this doctrine has been sometimes applied in the sale of articles other than manufactured goods. In the case of Randall v. Raper, Ellis B. & E. 84, seed barley had been sold and warranted to be "chevalier seed barley." The barley was sown, and proved to be an inferior and less productive variety of barley. The barley received was less valuable by 15*l*., than the same quantity of chevalier barley would have been; but it was proved that the purchaser lost in the yield of his crop, by reason of the difference, the sum of 26*l*., 7s., 6d. It was held that the loss in the yield was the natural result of the breach of warranty, and the plaintiff had judgment for that sum. So, in Borradaile v. Brunton, 8 Taunton, 535, a chain cable had been sold as a substitute for a rope cable of 16 inches, and warranted to last two years. A link of the chain broke within the two years, by which the chain and the anchor were lost. The recovery was for the value of both the chain and anchor; Chief Justice Dallas remarking, "the holding of the anchor by the cable is of the essence of this warranty. In the case of Mullett v. Mason, L. R., 1 C. P. 559, a cattle dealer had sold a cow, and fraudulently represented that she was free from infectious disease, when he knew she was not. The purchaser placed the cow with five other cows, who contracted the disease and all died. *Held*, that the purchaser was entitled to recover the value of all the cows as damages. The court said: "The defendant is liable for all the direct consequences of the plaintiff treating the cow as if it was free from any infectious disease, and placing it, as he naturally would, with other cattle, and the death of the other cows was a direct consequence of his doing that."

Speaking of this case and of the rule of damages in such cases, Mr. Benjamin, in his work on Sales, § 904, says: "The damages recoverable by the buyer for a breach of warranty may be greatly augmented, when they are the consequences of a fraudulent misrepresentation by the vendor," and the following authorities are to the same effect: Kingsbury v. Taylor, 29 Me. 508; Emerson v. Brigham, 10 Mass. 197; Stone v. Denny, 4 Met. (Mass.) 151; Arriez v. Morrison, 7 Tex. 372. So in Passinger v. Thorburn, 34 N. Y. 634, it was ruled that "where the defendant sold cabbage seed, and warranted the same to produce Bristol cabbages, which warranty was untrue, the damages would be the value of a crop of Bristol cab-

bages, such as ordinarily would have been produced that year, deducting the expense of raising the crop, and also the value of the crop actually raised therefrom." In delivering the opinion of the court, Davis, C. J., said: "The damages (on breach of warranty) must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation." Further on he said: "In the present case it can not be doubted that the damages which the plaintiff has sustained, are such as arise naturally from the breach of the defendant's warranty. His engagement was, that the seed he sold were Bristol cabbage seed, and would produce Bristol cabbages. It may, therefore, have been reasonably supposed to have been in the contemplation of the parties that if the seed were not Bristol cabbage seed, and would not consequently produce Bristol cabbages, that damages would necessarily occur to the plaintiff, and would be a natural consequence of such breach. The jury have so said in this case, and we think they came to a correct conclusion. The case of Flick v. Wetherbee, 20 Wis. 392, presented substantially the same question, and was ruled in the same way. Each of these cases arose on warranty, without any imputation of *scienter, suggestio falsi*, or *suppressio veri*. Fraud cut no figure in them; but it was ruled that the damages complained of and recovered, must have been within the contemplation of the parties. And it is certainly true that in each of the cases last cited, the injury or damage for which the recovery was had, was the direct, known result of the absence of the quality the commodities were warranted to possess. See also White v. Madison, 26 N. Y. 117.

Some well considered cases make a distinction between cases of mere breach of warranty, and cases of fraudulent representation of qualities not possessed, or fraudulent concealment of known unfitness for the service the seller knows the buyer has in view in making the purchase. In Bluett v. Osborne, 1 Starkie, 384, a bowsprit was sold, which at the time appeared to be sound, but was in fact rotten. Consequently, damages were claimed, going beyond the mere value of the bowsprit, if it had been sound. The court, Lord Ellenborough said: "No fraud is complained of, but the bowsprit turned out to be defective upon cutting it up." And he ruled that the measure of recovery was the value of the bowsprit if it had been sound. In the case of Maynard v. Maynard, 49 Vt. 297, the seller knew of the defect in the animal, and fraudulently concealed it. The action was case for the deceit. Large consequential damages were recovered. The principle of the decision is correctly stated in the head note, as follows: "Plaintiff, in purchasing a bull of defendant, informed him that he wanted the bull to put with his cows, but did not ask him whether or not the bull was suitable for that purpose. The bull, though sound in appearance, was to the knowledge of the defendant, without the power of propagation. Defendant did not disclose his knowledge of that defect, but otherwise used no means to conceal the defect, or in any way to mislead or deceive plaintiff. * * *Held*, that plaintiff might show that his cows, on account of not having been gotten with calf, produced less butter than they had been accustomed to produce."

The case of the defective cable above, is one of extreme, if not of questionable application of principle. So, in Brown v. Edgington, 2 Man. & Gran. 279, the doctrine was carried to extreme results. A wine merchant had ordered a crane rope from a dealer, who represented himself as a manufacturer of ropes, and notified the dealer, who took the dimensions, that the rope was wanted to raise pipes of wine from the cellar, and that it must be adapted to that use. In fact, the dealer procured the rope to be made by another, but this fact exerted no influence in the cause. The rope proving defective, parted in the act of hoisting a pipe of wine, by which the wine was lost. The recovery seems to have been, not only for the defective rope, but for the value also of the pipe of wine. The court held that "where a contract is, expressly or impliedly, to furnish goods of a particular description, a warranty is created that they shall be of that description." Nothing was said, either in the argument of counsel or in the opinion of the judges, on the question of the loss of the wine being too remote to justify a recovery therefor. It should, perhaps, be observed that in all these cases, except Mullett v. Mason, the injury resulted directly from the known use for which the articles were procured, without extraneous interference or adventitious circumstances, and purely from inherent defects or unaptness for the service required. They were the natural consequences of the falsity of the warranty. In a note to Sedgwick on Damages, 4th ed., pp. 334-5, it is said, "By the doctrine of the late decisions, when for the want of a certain, defined, existing and intrinsic quality which an article sold is warranted by the vendor to have, consequential damages naturally ensue as the direct result of its application by the vendee to the purpose for which he intended it, and the vendor knew he intended it, the vendor is liable for such damages." See also White v. Miller, 71 N. Y. 118.

In the cases of Kingsbury v. Taylor, Emerson v. Bingham and Stone v. Denny, *supra*, the measure of recovery was stated to be materially affected by the good faith or fraud of the seller. In cases of breach of warranty, untainted by bad faith, the measure of recovery is limited to compensation for the natural and proximate consequence of the failure of the commodity sold to come up to the warranty, uninfluenced by adventitious circumstances and can only include the consequences which were reasonably within the contemplation of the parties when they made the contract. In the present case, if there was no fraud or bad faith in the sale, the proper measure of damages is the difference between the value of the safe as it was and what it would have been worth if it had been as represented. This alone is the natural, proximate consequence of the breach; this alone can reasonably be presumed to have been within the contemplation of the contracting parties. To go

beyond this, would be to give to a contract of warranty all the attributes of a contract of insurance. The two contracts are very different in their scope and obligations, and contemplate very different consequences from their breach. The *nisi prius* case of Sanborn v. Henning, reported in American Law Register, N. S. 457, presented very nearly the same controverted questions, and the same conflict of testimony as are found in this record. The case resulted in a verdict for defendant, doubtless on a failure of the jury to find fraud or bad faith on the part of the seller. The very similar case of Walker v. Milner, was tried in London about the same time, before Lord C. J. Cockburn, but we have no access to a report of that case. In an able note to the American case, reviewing both trials, is the following language: "An undertaking against all possible force and skill of all future burglars is so much much more like a contract of insurance than one of warranty, that we doubt whether such an undertaking would even be held by the courts to be created by general words of warranty. A warranty has reference generally to the character and qualities of the thing warranted, not to the acts of third persons. But a contract of insurance does provide against perils of robbers, as well as perils of the elements. A contract of insurance, however, implies a premium paid for the risk assumed, in proportion to the amount of the risk, and also a fixed term of insurance. All these elements were wanting in the contracts of warranty set up in the cases before us. There is great force, however, in the position that a manufacturer who sells a safe, as a fire-proof or burglar-proof safe, thereby represents that its securities against fire or burglary are as complete as the experience of those engaged in the business can make them. But it also follows, that as soon as the warranty is construed as one, not of absolute, but only of comparative security, then the manufacturer is let in to show that the purchaser can only ask as much security as he is willing to pay for.

In the English case, there does not appear to have been any point raised as to the measure of damages. Both court and counsel seemed to have assumed that if the plaintiff was entitled to recover, he was entitled to recover the value of his lost property, 6,000*l*. This point, however, would appear to have been sharply contested in the case in New York, and plaintiff's counsel did not claim that he was entitled to anything more than the difference between the value of the safe purchased and that of such a safe as the representations entitled him to, unless the jury found a fraudulent warranty by the defendants. * * The general rule is that the parties are deemed to contemplate such damages, as the creditor may suffer from the non-performance of the obligation in respect to the particular thing which is the object of it, and not such as arise collaterally. The damages may be enhanced, it is true, where the conduct of the party in fault is fraudulent, when property has been sold for a particular use, and in other cases; but we know of no case where for a breach of warranty damages have been held recoverable, so far in excess of the amount involved in the original transaction, as the damages claimed in these actions."

The fraud which would justify a recovery in this case commensurate with the value of the goods lost from the safe, would not be the mere assertion that the safe was burglar-proof, or would resist the assaults of burglars for any specified time. That may have been the expression of an opinion honestly entertained. Integrity of purpose and fraud do not co-exist. Bad faith is necessary to maintain the claim to the larger damages. To make good this feature of the claim, there must have been an assertion as fact of that which the seller knew to be false, or a reckless, false affirmation that the safe was burglar-proof, when the seller did not know whether the assertion was true or false, or, a knowledge on the part of the seller that the safe was not burglar-proof, and a failure to communicate that knowledge, when he knew that the purchaser was contracting for the safe as burglar-proof, and the purchaser must have trusted these representations, and been misled by them. One of these categories must be shown, to entitle the plaintiff to the larger damages claimed.

The sale in this case was made by an agent, and the suit is against his principal. We have above laid down the rules for determining whether the act of the agent in this case is the act of the principal. Even if it should be shown that the agent was authorized to warrant the safe as burglar-proof, this would not conclude the principal, unless one of the forms of fraud above described can be carried home to the principal, thus making him a guilty participant in Stewart's fraud; or, unless it be shown that the principal, with a knowledge of the fraud perpetrated by the agent, received and retained the fruits of such fraudulent sale. Any thing short of this will leave the liability to account on the agent alone.

The first and second counts of the complaint are sufficient, for they charge on the defendants themselves, knowing and intentional misrepresentations in making the sale, that the safe would resist for twelve or twenty-four hours the most skilful attempts of burglars to enter it. The third count has the further defect that it fails to connect appellants with the alleged fraud of the agent.

Reversed and remanded.

THE DOCTRINE OF FLETCHER v. RYLANDS.

The case of Box v. Jubb, 27 W. R. 415, 4 Ex. D. 76, is one of a very interesting and difficult class. The class might be termed, by way of a compendious designation, "*sic utere tuo*" cases, from the fact that it is with respect to them that an ancient and solemn impostor (the maxim commencing with these words) most frequently comes to the front. The case of Box v. Jubb was as follows: The defendants possessed a reservoir with sluices connected with a main drain or watercourse from which the reservoir was supplied, and with sluices by which the surplus water was returned into this drain at a lower level. The combined effect

of the emptying of a reservoir, belonging to a third person, upon the defendants' premises, and of an obstruction in the drain below them, was to force water through the sluices into the defendant's reservoir, and so cause an overflow thence on the plaintiff's land. In an action for damage occasioned thereby, it was shown that the defendants had no control over the main drain or the other reservoir, and no knowledge of the circumstances that caused the overflow, and that the sluices were maintained so as to prevent overflow under ordinary circumstances. It was held that the defendants were not liable.

This case to some extent resembles that of Nichols v. Marsland, 23 W. R. 693; L. R. 10 Ex. 255; 4 Cent. L. J. 319, as to which upon a previous occasion we made some remarks. The contention of the plaintiffs in both cases was an attempt to carry the doctrine of Fletcher v. Rylands, L. R. 3 H. L. 330, a step further. In both cases it was held that the doctrine of Fletcher v. Rylands was not applicable. The result tends to show that some of the expressions used in the judgment of Mr. Justice Blackburn in Fletcher v. Rylands, in the Exchequer Chamber, and adopted in the House of Lords (expressions which have become houshold words, if the term is admissible, in the law courts with regard to cases of this nature), may be applied so as to have too wide a bearing if taken apart from the facts to which in that case they related. It is necessary to state shortly the facts of Fletcher v. Rylands in order to make what we have to say intelligible. In that case A was the lessee of certain mines; B was the owner of a mill. B desired to construct a reservoir, and employed competent persons—an engineer and a contractor—to construct it. A had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. When the water was introduced into the reservoir it broke through some of the shafts, flowed through the old passages, and flooded A's mine. It was held that A was entitled to recover damages from B in respect of this injury. In the House of Lords it was taken that the engineer and contractor had been guilty of negligence; but the decision in the case does not seem to have turned on that, but on the principles enunciated by Mr. Justice Blackburn in the Exchequer Chamber. In the court of Exchequer a good deal of the judgment had turned on the distinction between trespass and case, and the necessity of negligence to form a cause of action when the damage was not caused by an act in itself wrongful. But Mr. Justice Blackburn put the case on broader grounds. He said, "We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of the sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water of his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his property which was not naturally there harmful to others, so long as it is confined to his property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

The doctrine thus enunciated with regard to the liabilities of a person in respect of dangerous matters brought by him on to his own land must be understood as subject to certain limitations, and, broad and clear as the principle seems, there is somewhat of difficulty about it when tested by reason. To begin with, it is clear that certain exceptions must be made—such, for instance, as those that would come under the head of the exceptions suggested by Lord Blackburn himself—viz., cases where the act of God was the immediate cause of the release of the dangerous matter. Nichols v. Marsland comes under this exception. Again, cases where the damage is caused by the wrongful act of a third party may be exceptions. Lord Justice Bramwell suggested in Nichols v. Marsland the case of damage done by water in a cistern in which a mischievous boy bored a hole. The ground upon which Fletcher v. Rylands is put in Lord Justice Bramwell's judgment in Nichols v. Marsland is this: He says, "Then the defendant poured the water into the plaintiff's mine. He did not know he was doing so, but he did it as much as though he had poured it into an open channel which led to the mine, without knowing it. Here the defendant merely brought it to a place whence another agent let it loose." Similarly, Lord Justice Mellish, in the same case in the court of appeal, commenting upon Fletcher v. Ryland, says: "If, indeed, the damages were occasioned by the act of the party, without more, as when a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbor, the case of Fletcher v. Rylands establishes that he must be held liable. But the present case is distinguished from that of Fletcher v. Rylands in this, that it is not the act of the defendant in keeping this reservoir—an act in itself lawful—which alone leads to the escape of the water and so renders wrongful that which but for such escape would not have been wrongful."

The effect of the cases would, thus far, seem to be that where a person's act in altering the natural state of things on his land directly injures another's property, he is responsible. We mean by direct injury, one which is the consequence of the act in the necessary course of things, and without the intervention of any but ordinary causes. When the injury is not immediate, but other causes intervene, the intervention of which is extraordinary, the damage is too remote—it is not the direct natural consequence of the act done. We see considerable difficulty, as a matter of reason apart from the decisions, in determining the true principle which ought to govern these cases. Apart from the existence of any negligence, we must confess to having felt considerable difficulty with regard to the decision in Fletcher v. Rylands, though we know that that decision has always been considered as one of the greatest authority. A man makes a reservoir on what, *ex hypothesi*, so far as he knows, he is entitled to suppose to be solid ground, and by reason of the existence of artificial subterraneous channels, the water finds its way into a neighboring mine-owners mine. The maker of the reservoir is held responsible, because, though there was nothing *prima facie* unlawful in his act, he brought something on to his land

which was not there before, and without any fresh intervening cause of an extraordinary nature, but in the natural and necessary course of things, as the land then existed, it escaped on to his neighbor's land and did damage. It is to be observed that it is not as if the passages through which the water escaped were natural passages; they were artificial. Somebody had already altered the natural state of things. So that it would seem to come to this: if a man makes a reservoir, and afterwards, the mine-owner mines, and the water escapes by reason of his workings into his mine, clearly no action will lie. But if the mine-owner is first in the field, and makes his workings first, then the surface owner can not make his reservoir if the water would escape into the workings of the mine without compensating the mine-owner, even though he did not know, and had no reason to think, that there was any possibility of damage. This is a striking instance of the truth of the philosophical theory that assigns the origin of property to the fact of priority of occupation.

We come to the conclusion that Fletcher v. Rylands must be sound law, though not without some reluctance and difficulty. The truth is, it is an instance in which, of two parties equally innocent of negligence or intention to trespass on the other's property, one must suffer, and it is, perhaps, not wonderful that it should be difficult to ascertain which it is to be. It seems inevitable in the nature of things, that the lawful use by one landowner of his property should limit, to some extent, the power of the adjoining owner to do that which *per se* would be lawful with his property. This is in the nature of a reward to the earlier application of industry and enterprise, and so it is for the public benefit that it should be so. Unless the law were so, there would be no security for the results of enterprise and industry. But, granting this, and allowing that those who alter the existing state of things must be liable to the extent to which the decision in Fletcher v. Rylands applies, it may be said, Why introduce the qualifications applied in the cases of Nichols v. Marsland and Box v. Jubb? It may be argued that a man who takes upon himself to alter the existing state of things must be responsible for all the consequences, even though connected with his act by an unusual cause or causes intervening. A man, for instance, makes a very extensive reservoir; an extraordinary flood comes. If the reservoir had not existed no damage whatever might have happened to his neighbor, but the combined result of the reservoir and the flood is that the neighbor's house is thrown down. Why, in natural justice, should not the maker of the reservoir be as much responsible, in this case, as the defendant in Fletcher v. Rylands? The answer would seem to be, that if a man uses due skill and diligence and reasonable caution, he is entitled to alter the natural state of things, if he does not thereby directly and necessarily injure his neighbor's property, even although the result may, by reason of the intervention of an unusual cause, prove disastrous to his neighbor; and the reasonable ground for his being entitled to do so is, that otherwise the beneficial use of property and the development of its value by enterprise and industry would be unduly restricted. If a landowner could not alter the natural state of things and construct anything, without incurring the risk of liability for any damages occasioned by the unlawful act of a third person, or the unusual operation of the forces of nature in connection with such altered state of things, there are few alterations of an extensive nature that a landlord could safely make.—*Solicitors' Journal.*

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF NORTH CAROLINA.

June-July, 1879.

EVIDENCE — DECLARATIONS — Declarations of a vendor of land as to the fraudulent character of a deed executed by him, made after its execution but while he still remained in possession, are competent evidence against the vendee. Parol proof is admissible upon the identity of land described in a deed executed by a sheriff. Opinion by ASHE, J.—*Hilliard v. Phillips.*

MECHANIC'S LIEN—WHEN ATTACHES.—1. No "laborer's lien" has the effect of a lien upon lands, unless the notice of the lien is filed in the office of the clerk superior court. 2. The lien for material furnished does not attach on lumber sold, which was not used in the erection or repair of a building, unless it was sold with an understanding that it should be so used. Opinion by ASHE, J.—*Lanier v. Bell.*

COMMON CARRIER—CONTRACT LIMITING LIABILITY—UNREASONABLE REGULATION.—A common carrier can not by a special notice, brought home to the knowledge of the shipper of goods, much less by general notice, nor by contract even, exonerate itself from the duty of exercising ordinary care and prudence in the transportation of goods, though it may, by special contract, or notice brought home to the knowledge of the shipper, restrict its liability as an insurer, when there is no negligence on its part. Where the jury finds as a fact, that the common carrier has been guilty of negligence, a stipulation in the bill of lading that the damages must be assessed before the removal of the goods from the station, or that the claim for losses must be made within thirty days, is unreasonable and void. Opinion by ASHE, J.—*Capehart v. Seabord R. Co.*

ADMINISTRATOR AND GUARDIAN — PAYMENT OF DEBTS—SURETIES.—Where an administrator is also the guardian of a ward, to whom his intestate was indebted, whatever sum came into the hands of the administrator which was applicable to the debt due the ward is immediately transferred, *eo instanti*, by operation of law, to him as guardian, without any act done by him as administrator, and the sureties on the guardians bond become responsible therefor, to the exoneration of the sureties on the administration bond. Where such administrator erroneously paid over a portion of the fund applicable to the debt due the ward, to the intestate's other creditors, the sureties on the guardian bond can follow such fund into the hands of those who participated in the misapplication. Opinion by SMITH, C. J.—*Ruffin v. Green.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July, 1879.

MISREPRESENTATIONS—EVIDENCE.—1. Statements that a railroad company was able to lay its tracks and provide rolling stock and pay all bills contracted, and that the stock was not for sale, and could not be bought anywhere but of the defendant, made by the president of the corporation to one who was about to purchase stock, are statements which the jury would be warranted in finding were representations of facts of which he professed to have knowledge, and not the

expression of an opinion or estimate. Morse v. Shaw, 124 Mass. 59; Homer v. Perkins, 124 Mass. 431; Millikin v. Thorndike, 103 Mass. 385; Litchfield v. Hutchinson, 117 Mass. 197. 2. The plaintiff also offered to prove that at the time of the sale, and for the purpose of inducing him to buy, the defendant falsely stated that he knew there was money enough in the treasury of the company to purchase rolling stock for the road, provide and lay tracks and furnish all necessary equipments: *Held*, that if the defendant made such representations as representations of fact and not of opinion, then the falsity of the representations might be proved by competent evidence. Opinion by COLT, J.—*Teagin v. Irwin.*

SEDUCTION—EVIDENCE.—1. In an action for the seduction of a daughter, the plaintiff must prove that he was entitled to the service of the daughter at the time of the injury, and that the ability of his daughter to render service was impaired by the defendant's unlawful act. 2. Evidence that the daughter appeared strong and well before the alleged seduction, and that afterwards she became nervous and excitable and did not appear to be herself, though no pregnancy or disease ensued, will justify the jury in finding an incapacity to work as the proximate effect of the seduction. 3. When the plaintiff has not parted with his right to his daughter's service, it is sufficient to prove that she resides with him and is under age, or that, if she resides and is employed elsewhere, that he has not lost his right to her service. Opinion by COLT, J.—*Blagge v. Ilsley.*

TRUST FUND — STATUTE OF LIMITATIONS— EVIDENCE—INTEREST.—In an action of contract, the court, sitting without a jury, found that the plaintiff's intestate, who was living out of the State in September, 1852, sent to the defendant, who was living here, $900, to keep and invest for the intestate; that defendant received and invested the money in his own name, keeping it separate from other moneys for two or three years, and after that, mingling it with his own money in various investments, and keeping no separate account of the income or principal, and treating it as his own; that defendant never heard from the intestate after the receipt of the money; that there was no direct evidence of any express promise or agreement on the part of the defendant to hold or invest this money for the intestate; that the plaintiff gave bonds and notice of his appointment as administrator in September, 1874, and in the spring of 1876 made demand on defendant for said $900 and its accumulations. Upon exceptions to the rulings of the court, it was *Held*, 1. That the action was not barred by the statute of limitations. 2. That an express trust in personal property might be created and proved by parol. 3. That the defendant was chargeable with interest before the time of the plaintiff's demand. 4. That the defendant was entitled to show by his own testimony the purpose for which he supposed the money was sent to him, and the understanding with which he took it, in order to rebut the inference which the plaintiff sought to have the court draw from the circumstances which he put in evidence. Opinion by SOULE, J.—*Davis v. Coburn.*

SAVINGS BANK— PAYMENT TO ONE PRESENTING DEPOSIT BOOK.—The plaintiff's testatrix deposited money in a savings bank, receiving a deposit book which contained by-laws of the bank, declaring that it would not be responsible for loss sustained when a depositor had not given notice of his book being stolen or lost, if such book should be paid in whole or in part on presentment, and that it did not undertake to be answerable for the consequences of mistake as to identity, if it paid to a wrong party upon the bank book being presented. She also signified her assent and subscribed her name to the same by making her mark. She was unable to read, but that fact was unknown to the defendant. The bank paid the amount due on said book to a person unknown, who, after the death of the testatrix, presented the book for payment, representing herself to be the person therein named, the bank then believing her to be the original depositor. After the death of the testatrix, and before payment by the bank, the executor published the usual probate citation, addressed to the heirs at law, next of kin, and all persons interested in her estate, to appear and show cause, if any, against the probate of her will; but the bank had no actual notice of her death. In a suit by the executor against the bank to recover said amount, it was *held*, that the by-laws were reasonable and proper; that the plaintiff's testatrix was bound thereby; that her death was not a fact which the defendant was bound to know; and that the publication of the citation of the probate court was not notice to the defendant as matter of law. Opinion by COLT, J.—*Donlan v. Provident Institution for Savings.*

SUPREME COURT OF MICHIGAN.

June Term, 1879.

SETTLEMENT UNDER DURESS.—A settlement between debtor and creditor must be considered as made under duress, where the creditor has stopped the payment of moneys due the debtor from third parties, and where the debtor is compelled to make it in order to remove the stoppage and thus avert his financial ruin; and if the settlement thus forced was not in accordance with the legal rights of the parties, it may be set aside. Opinion by MARSTON, J.—*Vyne v. Glenn.*

ACTION ON NOTE—LEGAL TERMS NOT CHANGEABLE BY PAROL — MAKER'S PROMISE TO PAY FOR CO-MAKERS—OFFICER CAN NOT ACT IN ANTAGONISTIC CAPACITIES.—The makers of a note were directors of a railroad, and it was payable to the order of the president of the road, who was also president of a bank to which the note was transferred for value, before maturity. The bank sued defendant in assumpsit to recover a balance claimed to be due on the note, of which he was one of the makers. *Held*, 1. That evidence to prove an agreement that the makers of the note should not be personable liable in accordance with the terms thereof, and that it should be paid only out of the assets of the railroad company, was incompetent. 2. A promise made by one of the makers with his co-makers that in consideration of certain contracts being entered into with reference to the construction of the road, he would take certain subscriptions and notes received by the company, and would pay this note and release his co-makers from liability, could not affect their liability where the creditor's consent was wanting. 3. The bank president could not assume to act for the bank and consent to such arrangement so as to bind the bank; for he was liable as co-maker and indorser, and could not act in a double and antagonistic capacity. Stevenson v. Bay City, 26 Mich. 46. Opinion by MARSTON, J.—*Gallery v. National Exchange Bank of Albion.*

LAND CONTRACT— TENDER OF DEED—PROOF OF TITLE — EVIDENCE THAT MERITS WERE TRIED IN FORMER SUIT.—Action for the purchase-price of lands sold by contracts, to be paid for in annual installments, all due when suit was brought. The vendor had tendered the customary warranty deed and demanded payment. *Held*, 1. That where a contract obligates the vendor, when the purchase-price is paid, to "execute and deliver" to the vendee "a good and sufficient warranty deed," it is enough for the tender

a deed sufficient in form, without showing that he has at the time a title which the deed would convey. In the absence of any showing, the presumption will be that the vendee satisfied himself of the title when he made his bargain. Dwight v. Cutler, 3 Mich. 566; Allen v. Atkinson, 21 Mich. 361. 2. The evidence does not show that the merits were not tried in the former suit brought by the vendor on the contracts, after the installments had fallen due, wherein final judgment passed against plaintiff. The evidence given, all related to the tender of a deed; but it does not show that the former case turned upon the want of tender. When the subject-matter has confessedly been in litigation before, the evidence that the merits were not passed upon must exclude all the hypothesis. Opinion by COOLEY, J.—*Baxter v. Aubrey.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, June 21, 1879.]

EJECTMENT—ADVERSE POSSESSION FOR TWENTY YEARS — WHETHER TIME RUNS FROM DATE OF DEED OR OF TAKING POSSESSION.—This was ejectment by appellee against appellant for a certain part of a lot in the city of Chicago. Appellant defends as tenant to the heirs at law of one Frantz, deceased. Appellee and the heirs at law of Frantz, deceased, are seized in fee simple of adjoining lots, that of appellee being numbered four and that of appellant's lessor numbered three. The controversy grows out of a dispute as to the location of the boundary line between these lots. One M originally owned both lots. In 1846 he made a contract of sale of lot three to one H, who is since deceased, and placed H in possession of the lot. H did not finish making payment for the lot and receive a deed therefor until several years after, but his possession, claiming to be owner under his contract with M commenced in 1846, and was continued unbroken in him until his death, and after his death in his heirs at law until transferred to Frantz, and possession was in him and his heirs continuously, until the bringing of this suit in 1868—a period of more than twenty-one years. Before M sold, there was a fence on what was supposed to be the dividing line between lots three and four, which fence has remained in the same place. Counsel for appellee insist that the limitation by reason of adverse occupancy, only commences to run from the date of M's deed to H, which is less than twenty years before the commencement of this suit. SCHOLFIELD, J., says: "Appellee's position is untenable. As early as 15 Ill. 271, it was said: 'It is enough that a party takes possession of premises claiming them to be his own, and that he holds the possession for the requisite length of time, with the continual assertion of ownership. If he does not make the entry under proper title, his possession is considered adverse only to the portion actually occupied. In such case he acquires no interest beyond the limits of his enclosure.' See 86 Ill. 35; 73 Ill. 439; 65 Ill. 499; Washb. on Real Prop. (3d ed.) Vol. 3, p. 145, § 48, *et seq.*" Reversed.—*Schneider v. Botsch.*

INSURANCE—CONDITION IN POLICY BARRING SUIT AFTER TWELVE MONTHS—WHEN IT BEGINS TO RUN.—This was an action in a policy of insurance brought by appellants against appellee. To the declaration appellee filed a plea of the statute of limitations, that the suit was not brought within twelve months from the time the loss occurred, according to the terms and conditions of the policy. Demurrer interposed and sustained by circuit court. This was reversed by the appellate court, and now the case comes here on appeal. The policy contained provisions that loss was to be paid sixty days after due notice and proofs of the same, and that no suit or action against this company for the recovery of any claim by virtue of the policy shall be sustainable in any court until after an award fixing the amount of claim, unless such suit shall be commenced within twelve months next after the loss shall occur. The fire, producing the loss, occurred on the 14th of July, 1874, and proofs were made on the 21st of July, 1874. This action was commenced on the 13th of September, 1875. The action was not brought within twelve months after the loss occurred, but within twelve months from the expiration of sixty days after the loss. WALKER, J., says: "Appellants contend that the twelve months did not begin to run until the expiration of sixty days after the occurrence of the fire. All persons know that in giving force to laws and contracts of every description, the intention as therein expressed must govern. According to this rule we are wholly unable to perceive how the meaning of this language can be misunderstood. When did the loss occur? At the time of the destruction by fire. It is, however, insisted that the clause in the policy that the loss was to be paid sixty days after due notice and proof of the same, limits and controls the after inserted condition prohibiting the bringing an action more than twelve months after the loss should occur. We are unable to perceive that it controls this condition. We are referred to authorities which are supposed by appellants' counsel to hold that similar language in other policies means the assured may sue at any time within twelve months after the sixty days reserved by the company to make payment has expired. We have examined the authorities referred to and think they fail to sustain his position." Affirmed. —*Johnson. v. Humboldt Ins. Co.*

INJUNCTION—COLLECTION OF TAX—FRAUDULENT ASSESSMENT—IRREGULAR ASSESSMENT NO GROUND FOR EQUITABLE RELIEF—CERTIFICATE OF APPELLATE COURT—This is an appeal from a final order of the Appellate Court for the First District, reversing the decree of the Superior Court of Cook County, and dismissing the bill, which had been filed in the latter court by appellants, praying an injunction to restrain the collection of a portion of personal property taxes for the year 1875, assessed against appellants. The only ground of relief under the bill is that of fraudulent assessment of the property taxed at too high a rate. The only question of doubt arising is upon the effect to be given to the certificate of the appellate court as to its finding of facts. The order reads: * * * "And as to our finding of facts, we hereby certify that we find the facts as charged in the complainant's bill, but that said facts do entitle said complainant to equitable relief." SHELDON, J., says: "As there is an allegation in the bill that the assessor fraudulently assessed the property at the value he did, it is contended by appellant that, according to the language of the certificate, the appellate court found the assessment to be fraudulent. If that were so, and it was to be taken as a fact in the case that the assessment was fraudulent, it would follow that it was error to order a dismissal of the bill, as this court has declared that a court of equity will entertain a bill to enjoin the collection of a tax when property has been fraudulently assessed at too high a rate. 24 Ill. 489; 76 Ill. 561; 83 Ill. 602. But we can not give to the language as to the finding of facts the effect claimed. The words used, as we understand, mean that the facts were found as charged in the bill, but not the conclusion of law from the facts, viz.: fraud. From the record we find that it fails to show any case of fraudulent assessment, but one only of an excessive valuation, and irregularity in the making of the assessment. On the ground only of a valuation being excessive, equity will not interfere to restrain the collection of a tax. 68 Ill. 510; 76 Ill. 398." Affirmed. *Gage v. Evans.*

REPLEVIN—FAILURE TO FIND PROPERTY—ORDER OF COURT PUTTING DEFENDANT IN CONTEMPT, IMPROPER.—This is an appeal from an order, or judgment rendered in the Circuit Court of Cook County, wherein appellant, Yatt, was fined and ordered to be imprisoned for contempt of court, for a failure to obey a certain order made by the court in an action of replevin. Goldschmidt was plaintiff, and Yatt defendant. The writ of replevin was issued on May 2d, 1878, returnable third Monday of May, for the recovery of a certain gray horse. The sheriff made return of service of the writ by reading to Yatt, and demanding of him the horse, which he refused to deliver up. The court made a peremptory order ruling Yatt to deliver the property to the sheriff forthwith, which was served, and defendant appeared and filed answer, which, not being regarded as sufficient, the court rendered the judgment to reverse which this appeal was taken. CRAIG, C. J., says: "We find no provision of the statute which authorizes the court from which the writ issues, in case the officer fails to find the property described in the writ, to compel by order a defendant to surrender the property; nor are we aware of the existence of any law which confers upon the court such extraordinary power. The theory of the statute under which writs of replevin are issued, would seem to require the officer who holds the writ, wherever the property can be found, to take it and deliver it over to the plaintiff whether the defendant, who has the possession of the property, may feel disposed to give it up or not, is a matter of no consequence. In the event, however, that the property can not be found by the officer, then the writ can be read to the defendant, and the case can proceed as an action of trover. * * * Had this property been taken on the writ of replevin, and had the defendant afterwards interfered with the possession or control of the property, a different question would have arisen. Doubtless the case then would have been within the rule declared in Knott v. The People, 83 Ill. 532, and The People v. Neill, 74 Ill. 68." Reversed.—*Yatt v. The People.*

SUPREME COURT OF MISSOURI.

April Term, 1879.

MECHANIC'S LIEN—DESCRIPTION OF LAND.—Petition in a mechanic's lien suit contained three counts, each for liens on separate pieces of property, and separate judgments were rendered on each count for the plaintiff. In the first count, the only description, in the lien to identify the land, was that "said house is situated near the N. E. corner of N. E. qr. of S. W. qr. sec. 9, Town. 50, Range 10, in Audrain County, Mo." *Held*, that the above was no description whatever, under Wag. Stats., p. 909, sec. 5, of the acre of ground on which the lien was claimed, and was insufficient (32 Mo. 262; 51 Mo. 441): the judgment reversed as to the first count. The second count held not to be defective, because the land on which the house was located was not described in the lien as being in Audrain county, the township and range being given, and it sufficiently appearing that it was in Missouri. 47 Mo. 179. Judgment affirmed as to second and third counts. Opinion by NORTON, J.—*Wright v. Beardsley.*

GARNISHMENT—NEGOTIABLE NOTE TRANSFERRED AS COLLATERAL SECURITY.—C brought an attachment suit against G, and D who had previously executed a note to G, was summoned as garnishee. Prior to the attachment, G transferred the note by delivery to S. D as collateral security for a pre-existing debt. D answered, and by leave paid the money into court. S. D was made a party, and claimed the proceeds. C, the attaching creditor, also claimed it, because there was no sufficient consideration to support the transfer. *Held*, that he who takes a negotiable note as collateral security for a pre-existing debt, will hold it subject to all the equities existing between the original parties, and in all other respects his title is good as against the world, and that the maker in the present case is asserting no equities against the holder. On the contrary, he admits the debt, and has paid the amount into court, and if any equities did exist in favor of the maker, the attaching creditor could not avail himself of them. S. D's debt exceeded the amount of the note, and there being no fraud in the transfer, he is entitled to the proceeds; nor does the fact that the note was transferred by delivery only, in any way impair his rights to the proceeds. Affirmed. Opinion by HOUGH, J.—*Davis v. Carson.*

TAX BILLS FOR STREET IMPROVEMENTS—POWER OF CITY AUTHORITIES MUST BE REASONABLY EXERCISED FOR THAT PURPOSE—EVIDENCE TO IMPEACH ORDINANCE BY SHOWING OPPRESSIVE EXERCISE OF POWER, ADMISSIBLE.—Suit on special tax bill issued by City Engineer of Kansas City in favor of plaintiff, and against a lot owned by defendant. The tax bill was one of many issued to plaintiff, as contractor for building a sidewalk three blocks in length, upon one side of a street on which defendant's lot fronted, under an ordinance of Kansas City directing the construction of this sidewalk. On trial, plaintiff read in evidence the tax bill, and defendant offered to prove, and produced competent witnesses for the purpose, that the lots in question along which the sidewalk was constructed, were unoccupied, and that for a space of a quarter of a mile east thereof, the ground was wholly uninhabited, and south thereof, a like space of one mile; that there were no persons living in the vicinity; that teams passed over the lots and adjoining grounds, without regard to the streets; that there were no persons living in the vicinity by whom the sidewalk in question could be used, and that it did not connect with any other sidewalk or traveled street; that the building of said sidewalk was wholly unnecessary and useless, and could and does subserve no useful purpose; that a portion of it in wet weather is submerged, and at some points it is habitually crossed by teams, and has been thereby ruined; that there was not at the time of passage of said ordinance, and never has been, any apparent or possible use or necessity, present or prospective, and that the ordinance was entirely unreasonable and void. This evidence was excluded; judgment for plaintiff and defendant appeals. *Held*, 1. Plaintiff made out his case *prima facie* on production of tax bill. There can be no question but that the city was, under its charter, authorized to have work done of the description specified in the bill sued on, and the admissibility of the evidence depends upon the point whether the ordinance can be assailed in the manner attempted. 2. While the authorities of a city may be said to have a large discretion as to the necessity or expediency of the ordinances which they adopt, their power in this regard is not omnipotent: otherwise the citizen would be without remedy or redress. These powers must be exercised within the bounds of reason, and of apparent necessity; they must not impose a burden without a benefit, and the reasonableness of their exercise is a fit subject for inquiry. This principle has been expressly recognized by this court in The City of St. Louis v. Weber, 44 Mo. 547, and this doctrine is one of general recognition. If the testimony offered by defendant set forth the facts, then the ordinance for the paving of the sidewalk in

question in an unhabited portion of the city, and totally disconnected with any other street or sidewalk, was altogether unreasonable and oppressive, and presents such features as loudly invoke judicial inquiry. Reversed and remanded. Opinion by SHERWOOD, C. J.—*Corrigan v. Gage.*

CRIMINAL LAW—QUALIFICATION OF JURORS—PROOF OF VENUE—PROMISES TO WITNESS—FURNISHING LIQUOR TO THE JURY.—On a trial for murder persons are properly rejected as jurymen who, on their *voir dire*, answer that they would not convict on circumstantial evidence alone. The State has the same right as the defendant to an impartial jury, and the fact that the above is not enumerated among the disqualifications to serve as a juror in Wag. Stat., pp. 1102 and 1103, §§ 9, 10, 12 and 13, is not to be regarded as expressive of the legislative intent to exclude such disqualification. 9 Mo. 3; 41 Texas, 172; 2 Texas Ap. 432. The venue of the crime is to be established like any other fact, and facts and circumstances in evidence tending to show it will be sufficient to sustain the verdict of a jury on that issue. A promise by the prosecuting attorney not to prosecute a witness held on another indictment, after he had testified in the case on trial, is not a ground of objection affecting the competency of the witness, but a fact for the jury affecting his credibility. A new trial was asked on the ground that liquor had been furnished the jury, and affidavits were filed showing that two quarts and a half were so furnished; about one-half of it before the retirement to consider the verdict, and the remainder while the jury was out. *Held*, in the absence of proof showing that any of the jury were intoxicated, or that the verdict was obtained by improper means, the verdict should not be disturbed. 20 Mo. 399. Affirmed. HENRY, J.—*State v. West.*

BOOK NOTICE.

UNITED STATES DIGEST. A Digest of Decisions of the Various Courts Within the United States. By BENJAMIN VAUGHAN ABBOTT. New series, vol. 9. Annual Digest for 1878. Boston: Little, Brown & Co. 1879.

The United States Digest for 1878 includes exactly one hundred volumes of reports; of these eight are from the Federal, and the remainder from the State courts. This publication is too well known to the profession to require any lengthy comments, or even any notice at all except the mere statement of its being ready. The profession look eagerly for its annual appearance, and lose no time, after its issue, to transfer a copy to their shelves. There are thousands of law books which can better be spared than this, and but very few which are referred to oftener. The printing and binding of this volume are, as usual, most excellent.

QUERIES AND ANSWERS.

[The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]

*** *The following queries received during the past week are respectfully submitted to our subscribers for solution, by request of the senders. It is particularly desired that any of our readers who have had similar cases, or have investigated the principles on which they depend, will take the trouble to forward an answer to as many of them as they are able.*

QUERIES.

24. A OWNS A TRACT OF LAND and conveys it to B who neglects to have his deed recorded. A dies, and C, his only heir, conveys the land to D for a valuable consideration, who had no actual notice of the deed to B. The land is wild and uncultivated. Is D an innocent purchaser? C. M.

25. A BEING SEIZED IN FEE OF CERTAIN REAL ESTATE conveyed to B, in fee, without his wife joining. B then mortgaged to C. Afterwards B conveyed in fee to the wife of A. What has become of the *inchoate* right of dower of the wife of A? PRESTON.

WARRENSBURG, Mo., Aug. 29, 1879.

26. A, a constable, by virtue of an execution against the goods and chattels of B, levied on the property of B. B replevied, and trial had, during which A testified he was a constable, and by virtue of his official capacity made the above levy. To which evidence B objected, claiming A's official character must be shown by the records, or transcript of the records of the county clerk. Must A show, in the above case, his official character by records or transcripts, or should he have been allowed to testify as above stated, and the same held to be competent evidence? S. J. W.

Lincoln, Ill.

27. A and B own two adjoining parcels of land, and upon their dividing line is situate a lake, partly upon the land of A and partly upon the land of B. There were no fish in the lake, and A imported from Germany some carp (fish), with which he "stocked" the lake. The fish have since rapidly increased in number, and have a high market value. B has commenced to take the fish from *his* side of the lake, and sell them in market. Can A enjoin him from so doing?

San Luis Obispo, Cal. W. H. S.

28. A, in his life time, for value executed and delivered his promisory note to B. After maturity of note, A died intestate, leaving his widow C and three children surviving. Upon application, C, his widow, was appointed administratrix of his estate, who, during statutory time for presenting claims, took up note executed by A in his life time, by giving her individual obligation to B instead of approving claim, and paying the same from funds of the estate. By depreciation in value the estate of A not solvent when final distribution is made, and pays only fifty cents on the dollar. What is the liability of C upon personal note given for note against A? O.

29. IS A MUNICIPAL CORPORATION, holding stock in a railroad corporation, liable like an individual under a statute providing that the stockholders shall be individually liable for all claims for labor performed in the construction of the road, after the assets of the corporation have been exhausted?

W. E.

ANSWER.

No. 20.

[9 Cent. L. J. 160.]

It seems to me that in the case as put the query resolves itself into this, viz.: What are the rights of a senior mortgage after a sale under a junior one? There

are no equities in this case which estop E from enforcing his legal remedies, and he may so do by a sale under his judgment, and in the event that a sale is had and confirmed, and deed executed, he will acquire the legal title divested of any interest D may have in the land. Prior to D's sale, C had the right to redeem from both *liens*—D had the right to redeem from E's *lien*, and be subrogated to E's rights, but after the *sale*, D, in addition to *his* right of redemption, was clothed in C's rights, and can pay E off and be the absolute owner of the land, but failing so to do a sale by E cuts him off. This rule, it seems to me, is elementary. See Pomeroy, Remedial Rights, sec. 336, and note 1 thereto, for discussion of foreclosures, etc.

KANSAS.

NOTES.

THE United States Circuit Court for this district was opened Monday, the 15th inst., Judge Arnold Krekel, of the court for the Western District of Missouri, presiding. The judge is in his usual vigorous condition, and the bar may look for another season of his able and energetic administration of justice. Judge Krekel will probably hold court during the entire term, as the attendance of Judge Caldwell seems to be a matter of great uncertainty, on account of the pressure of business in his own court.

ISAAC GRANT THOMPSON, the founder and managing editor of the *Albany Journal*, died at his country residence at Saratoga Springs, on the 30th ultimo, after an illness of one week, of congestion of the lungs resulting from diphtheria. His death was very sudden and unexpected He had so far recovered from his original disease as to go out into the street on the 28th and on the 29th, and the congestion from which he died was of only twelve hours' duration. Mr. Thompson was about thirty-nine years of age. He was a native of Rensselaer county, New York, where he had always lived, with the exception of a few years of his early life passed in the West. His education was of the common schools and academies. In his youth he had taught in both departments. He was admitted to the bar of this State in 1865. Having always a predilection for the editorial occupation, he became city editor of the *Troy Daily Press* about 1869, at the same time compiling some of his minor legal treatises. In 1870 he founded this journal. In 1871 he commenced the publication of the American Reports. He wrote a treatise on the Law of Highways, a treatise on Provisional Remedies, edited an edition of Warren's Law Studies, supplying a chapter on the Study of Forensic Eloquence, compiled a volume of National Bank Cases, manuals for supervisors, assessors, town clerks, and collectors, a digest of the first twenty-four volumes of the American Reports, edited with Mr. Cook six volumes of the Supreme Court Reports of this State, which effected a revolution in our reporting system, and at the time of his death was engaged upon the most important law treatise of his life, which he leaves half finished. He was married in 1872. Such is the outline of his short and busy life.—[*Albany Law Journal.*

WILLIAM H. HAYS, of Springfield, Ky., will succeed the late Judge Ballard as United States District Judge for the District of Kentucky.——The following unique advertisement appears in a New York paper: "Legal advice upon any subject for $1. Address, stating facts, inclosing $1, Law Agency, Box No. ——, Post Office, New York. Communications confidential. Confidential transactions conducted satisfactory. References given."——A decision of much interest to the press has been lately made in England. The London *Standard* charged that Lord De L'Isle, a peer of the realm, had been sued by a coal dealer for a ton of coal, and had pleaded the privilege of the peerage under an old and half-forgotten law, to escape judgment. His lordship brought suit for libel, and proved that the charge was wholly without foundation. During the trial, however, it was shown that the report would have been in all respects true, had it been said of a certain Irish peer named Lord Lisle. The *Standard* meanwhile had made an explanation and apology, and it is thought that the plaintiff will have to be satisfied, though the case is not yet ended. The court held that, though there had been carelessness, there was no malice and no injury, and that papers should not be punished for an occasional mistake that might happen to any paper, especially where no real injury had been done by the publication.

AN important ruling, under the extradition law, has been lately made in the United States District Court of New York. One Catlow was arrested on the arrival of the steamship Arizona from England, for the murder of the steward during the voyage, and the British authorities applied for his extradition to England, to be tried there for the crime. In refusing the application, the commissioner said: "The power of a commissioner duly appointed to act in proceedings for extradition, is derived from section 5270 of the Revised Statutes of the United States. This provision gives the power to arrest, and to examine the evidence of criminality. The commissioner is a creature of statutes, and derives his authority therefrom. * * * It is well settled in extradition cases, that the evidence in the mind of the examining magistrate must be such as to justify the presumption of guilt, and this presumption must arise upon the facts of the case. * * * The defense claim that no crime has been committed, for the reason that the accused was insane at the time, and is not responsible for the deed. I have been unable to find a case of extradition where the defense was the same as the plea set up here, and consequently I have no precedent as a guide. * * * The testimony clearly, to my mind, justifies the conclusion that Urban Catlow, on the morning of August 15, at the time he plunged the knife into the neck of the deceased man, was a being bereft of reason, deprived of understanding and memory, unconscious of what he was then doing, actuated to violence by a force born in madness, having none of the elements of the passions, or the rational attributes of intelligence. * * * If the prisoner was insane when the act was committed, then there is no evidence of criminality, then no crime. If the evidence produced relates to the killing without carrying with it the elements which make the killing a crime, then the charge of murder is not sustained. * * * I am forced to the conclusion that the accused is entitled to be discharged from custody. I take this opportunity to add that Congress has made no provision for the extradition of witnesses to testify in a case of this kind; and as some of the witnesses who gave evidence on the examination have departed to the western portion of the country, not to return, and there being no compulsory process to remove witnesses to the demanding government to testify in the English courts, thereby possibly making an indictment and trial ineffectual for all practical purposes, I am the more confirmed in the conclusion which I have stated. I hereby order the discharge of the prisoner."